No. 16-26

IN THE

Supreme Court of the United States

BULK JULIANA LTD. and M/V BULK JULIANA, her engines, tackle, apparel, etc., *in rem*,

Petitioners,

v.

WORLD FUEL SERVICES (SINGAPORE) PTE, LTD.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF OF PETITIONERS

Peter B. Sloss
Robert H. Murphy
MURPHY, ROGERS, SLOSS, GAMBEL & TOMPKINS, APLC
701 Poydras Street
Suite 400
New Orleans, LA 70139

E. Joshua Rosenkranz
Counsel of Record
Thomas M. Bondy
Cynthia B. Stein
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019
(212) 506-5000
jrosenkranz@orrick.com

Counsel for Petitioners

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

This Court's review is necessary to resolve two circuit conflicts central to the question here: whether a foreign supplier can use a contractual choice-of-law clause to bind a nonparty vessel owner to a maritime lien that would otherwise not arise by law. First, the courts of appeals differ as to whether contracting parties may use a choice-of-law clause to bind a nonparty to a lien. Second, the courts disagree as to whether the Commercial Instruments and Maritime Liens Act (FMLA) can be invoked by foreign suppliers in foreign transactions. *See* 46 U.S.C. § 31342(a). All but one coastal jurisdiction has weighed in on one or both of these conflicts. The disagreement generates worldwide confusion in the shipping industry, undermines the uniformity of maritime law, and threatens to extend United States law beyond its proper reach. Accordingly, the petition should be granted.

ARGUMENT

I. The Circuits Disagree Over Whether A Supply Contract May Bind A Nonparty To A Maritime Lien Through A Choice-Of-Law Clause.

The Fifth Circuit's decision, like decisions of the Fourth and Ninth Circuits, contradicts the Second Circuit's holding that "maritime liens arise separately and independently from the agreement of the parties, and rights of third persons cannot be affected by the intent of the parties to the contract." *Rainbow Line, Inc. v. M/V TEQUILA*, 480 F.2d 1024, 1026 (2d Cir.

1973). World Fuel Services (Singapore) (WFS) contends it obtained a maritime lien enforceable against the vessel M/V BULK JULIANA when WFS and Denmar—the vessel's subcharterer—agreed that the bunker sale would be governed by United States law. Absent the choice-of-law clause, Singapore law would govern the transaction, and WFS could claim no lien. App. 9, 12. In upholding WFS's asserted lien by giving effect to the choice-of-law clause, the Fifth Circuit aligned with the wrong side of an established conflict regarding whether a nonparty is bound by a maritime lien arising from a contractual choice-of-law provision. The Fourth, Fifth, and Ninth Circuits elide two fundamental rules that the Second Circuit affirmed decades ago: (A) Parties to a contract may not prejudice a nonparty by binding it to a choice-of-law clause; and (B) parties cannot bind vessels to maritime liens through contract alone, because maritime liens arise only by operation of law.

A. The result below would not stand in the Second Circuit. There, although contracting parties may intend for United States law to apply, "rights of third persons cannot be affected by the intent of the parties." *Rainbow Line*, 480 F.2d at 1026. Then-Judge Kennedy later cited this "obvious truism—nonparties cannot be bound by an agreement." *Gulf Trading & Transp. Co. v. M/V TENTO*, 694 F.2d 1191, 1196 n.8 (9th Cir. 1982) (Kennedy, J.).

The Fourth, Fifth, and Ninth Circuits depart from this course. *See* App. 14-15; *Triton Marine Fuels Ltd. v. M/V PACIFIC CHUKOTKA*, 575 F.3d 409, 414-15 (4th Cir. 2009); *Trans-Tec Asia v. M/V HARMONY CONTAINER*, 518 F.3d 1120, 1126-27 (9th Cir. 2008).

In those courts, "where foreign parties have specified that they want United States law to determine the existence of a maritime lien in a transaction involving multiple foreign points of contact, and the ship has sailed into the United States, it is reasonable to uphold the choice of American law"—even when that choice would burden a nonparty's property. App. 15 (quoting *Trans-Tec*, 518 F.3d at 1126).

Courts and commentators readily acknowledge that "where [a] choice of law provision, if enforced, would adversely affect the rights of a third party, the circuits are split." Michael Raudebaugh, Note, *Keep 'em Separated*, 34 Tul. Mar. L.J. 647, 649 (2010). The Fourth Circuit stated it this way: "There is a split of authority among the circuits as to this issue, with the Second Circuit's position in *Rainbow Line* being at variance" with that of other circuits. *Triton*, 575 F.3d at 414; *see also* Mark S. Davis & Jonathan T. Tan, *To Port or Starboard?*, 46 J. Mar. L. & Com. 395, 398-99 (2015) (highlighting this "well-established" conflict).

This commentary belies WFS's assertion (at 8-9) that *Rainbow Line*'s critical statements were merely dicta. If the choice-of-law clause in that case applied, that court would not have had occasion to conduct a choice-of-law analysis. Nor was *Rainbow Line* "unreasoned" (Opp. 9[1]) because it did not cite *M/S BREMEN v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972). *BREMEN* did not address the rights of nonparties, but rather a "party seeking to escape his [own] contract." *Id.* at 17-18. And while WFS claims (at 10) that *Rainbow Line*

[1] "Pet." refers to the Petition, "Opp." to the Brief in Opposition, and "C.A." to documents filed in the court of appeals.

is distinguishable because it "addressed the rights of a party significantly more removed from the transaction" than a vessel owner, that distinction is without a difference: "A third party is a third party." Martin Davies, *Choice of Law and U.S. Maritime Liens*, 83 Tul. L. Rev. 1435, 1457 (2009). WFS asserts that Petitioners are not unfairly burdened by the lien because the law provides that Denmar, as charterer, had "the presumptive and apparent authority to bind the vessel *in rem*." Opp. 14-15. But that begs the choice-of-law question. Under Singapore law, Denmar did *not* have such authority. App. 12. Denmar had that authority only if the FMLA applies, and the FMLA applies only if the choice-of-law provision is enforceable against Petitioners.

B. The approach of the Fourth, Fifth, and Ninth Circuits also runs contrary to the established principle that maritime liens cannot be created by contract. The *Rainbow Line* court accordingly rejected the contention that a maritime lien was created by a choice-of-law clause. The Second Circuit recognized that "maritime liens arise separately and independently from the agreement of the parties." 480 F.2d at 1026 (citing *The Bird of Paradise*, 72 U.S. 545, 555 (1866), and *Piedmont & Georges Creek Coal Co. v. Seaboard Fisheries Co.*, 254 U.S. 1, 10 (1920)). The Fourth, Fifth, and Ninth Circuits defy this principle by enabling a foreign supplier to obtain a maritime lien otherwise precluded under governing law by adding some extra words to a sales contract to which the vessel owner is not party. App. 16; *Triton*, 575 F.3d at 416, 419; *Trans-Tec*, 518 F.3d at 1126-27.

WFS concedes that "the inclusion of a provision that a contracting party 'shall have a maritime lien on the Vessel' does not create a lien." Opp. 17. It nevertheless insists that a lien created by a choice-of-law provision arises by law and not contract. That view is unsustainable. WFS acknowledges it would not "be entitled to a maritime lien under Singapore law." Resp. C.A. Br. 20. Accordingly, the asserted lien exists not because WFS and Denmar entered into a lien-conferring agreement, but because they attempted to write a lien-conferring provision into that agreement. The Fifth Circuit's contrary conclusion is inconsistent with the Second Circuit's holding in *Rainbow Line* and with this Court's precedents. 480 F.2d at 1026; *see Newell v. Norton*, 70 U.S. 257, 262 (1865).[2]

C. The misguided departure from *Rainbow Line*'s two pillars, exacerbated by the Fifth Circuit's erroneous decision in this case, erodes fundamental principles of maritime law—and the legal community is taking notice. Last year, Judge Watford urged the Ninth Circuit to reconsider *Trans-Tec* because it is "obvious" that choice-of-law clauses cannot be enforced against "a non-party that neither knew about nor consented to the contractual provision at issue." *O.W. Bunker Malta Ltd. v. MV TROGIR*, 602 F. App'x 673, 677 (9th Cir. 2015) (Watford, J., concurring). One commentator noted that "[t]o regard the parties' choice as being determinative of the law governing the availability of a maritime lien is simply to ignore or to gloss over the fundamental proposition stated so

[2] As we explain in the Petition (at 12), WFS's attempt to create a lien by contract is also an impermissible attempt to create subject matter jurisdiction by consent.

clearly by the *Rainbow Line* court." Davies, *supra*, at 1456. This Court should grant the petition to resolve the inconsistent approaches taken by critical maritime jurisdictions and set the Fourth, Fifth, and Ninth Circuits back on course.

II. The Fifth Circuit's Opinion Deepens A Circuit Split On The FMLA's Application To Foreign Transactions.

Even assuming the Fifth Circuit were correct that a contractual choice-of-law provision can create an FMLA lien that would not otherwise exist, the court was wrong that the FMLA applies here. Congress intended the FMLA to protect American suppliers, not foreign suppliers like WFS—at least not where, as here, the foreign supplier supplies a foreign-flag vessel in a foreign port. In incorrectly concluding otherwise, the Fifth Circuit contributed to yet another entrenched circuit conflict and improperly extended the FMLA to a foreign transaction with no meaningful connection to the United States.[3]

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[3] Any purported U.S. ownership interest in Petitioners or WFS would be irrelevant. "Courts have long presumed the institutional independence of related corporations … when determining if one corporation's contacts with a forum can be the basis of a related corporation's contacts." *Dickson Marine Inc. v. Panalpina, Inc.*, 179 F.3d 331, 338 (5th Cir. 1999) (citing *Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333 (1925)). And the subject of the circuit conflict is whether the FMLA applies to foreign suppliers of *foreign-flag* vessels in foreign ports. *Triton*, 575 F.3d at 417-18; *Trans-Tec*, 518 F.3d at 1129-30; *Trinidad Foundry & Fabricating, Ltd. v. M/V K.A.S. CAMILLA*, 966 F.2d 613, 617 (11th Cir. 1992). M/V BULK JULIANA is "a Panamanian-flag vessel." App. 2.

A. The principle that the FMLA does not protect foreign suppliers used to be uncontroversial. Decades ago, the First Circuit held that an English fuel broker could not claim a maritime lien against a vessel, even though the American direct suppliers "would be entitled to" one. *Tramp Oil & Marine, Ltd. v. M/V MERMAID I*, 805 F.2d 42, 44 (1st Cir. 1986). As that court explained, the legislative history of an amendment to the FMLA confirmed that the Act's "primary concern … is the protection of American suppliers of goods and services." *Id.* at 46 (citing H.R. Rep. No. 92-340 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1363, 1365). With that "purpose in mind, and in light of the principle that maritime liens are to be strictly construed," the court "decline[d] to extend the law" beyond the "intended beneficiar[ies]" of the FMLA: "American supplier[s]." *Id.*

Other courts, including the Eleventh Circuit, quickly joined the First Circuit in concluding that a foreign supplier cannot acquire an FMLA lien—at least where, as here, the necessaries were supplied to a foreign vessel in a foreign port. *Trinidad*, 966 F.2d at 617; *Swedish Telecom Radio v. M/V DISCOVERY I*, 712 F. Supp. 1542, 1545-46 (S.D. Fla. 1988). In *Trinidad*, the Eleventh Circuit denied the existence of a lien asserted by a foreign supplier for necessaries provided to a Norwegian-flag vessel in a West Indies port for "two reasons." 966 F.2d at 617. WFS only references the second reason—that English law governed. Opp. 12. The primary reason, however, was that the FMLA "does not provide for a maritime lien for goods and services supplied by a foreign plaintiff to foreign flag vessels in foreign ports." 966 F.2d at 617.

Trinidad and *Tramp Oil* thus squarely decided that the FMLA does not protect foreign suppliers like WFS. *Contra* Opp. 11-12. Their interpretations of the FMLA have been adopted by leading admiralty authorities. *See* Thomas A. Russell, 2-III Benedict on Admiralty § 38 (7th rev. ed. 2016). Indeed, the district courts in *Triton* and *Trans-Tec*—later overturned by the Fourth and Ninth Circuits respectively—relied heavily on the First and Eleventh Circuit decisions in holding that "the FMLA is not to be applied extraterritorially to confer a maritime lien upon" foreign suppliers in transactions with foreign vessels in foreign ports. *Triton Marine Fuels Ltd. v. M/V PACIFIC CHUKOTKA*, 504 F. Supp. 2d 68, 73 (D. Md. 2007); *accord Trans-Tec Asia v. M/V HARMONY CONTAINER*, 437 F. Supp. 2d 1124, 1135-36 (C.D. Cal. 2006).

In overturning those district court decisions, the Fourth and Ninth Circuits created a direct conflict of authority to which the Fifth Circuit has now added. *See* Ian Taylor, Note, *How Far Does the FMLA Reach?*, 33 Tul. Mar. L.J. 337, 339 (2008) ("[C]ourts have struggled to reach a consensus on … to what extent the rights provided under U.S. law extend to foreign suppliers of necessaries supplying foreign-flagged vessels in foreign ports."). In *Trans-Tec*, the Ninth Circuit analyzed the precise legislative history the First Circuit considered in *Tramp Oil* but drew the opposite conclusion, reasoning that "the House Report's mention of 'American materialmen' … did not *exclude* foreign 'materialmen' from its reach." 518 F.3d at 1130 (emphasis added). It rejected *Trinidad*'s conclusion that the FMLA does not apply to foreign transactions because the statute's language "is not

limited" to American-flag vessels or American ports. *Id.* (emphasis added). The Fourth Circuit likewise dismissed *Trinidad* and *Tramp Oil* as unpersuasive because the FMLA's "plain language" does not limit its application to American suppliers or American vessels. *Triton*, 575 F.3d at 417. The Fifth Circuit, in dismissing Petitioners' contention that "United States law has no application to this Singapore-centric transaction," Pet'rs C.A. Opening Br. at 12, adds to this concrete and acknowledged conflict on the FMLA's application to foreign transactions.

B. It is a "longstanding principle of American law" that, absent clear congressional expression, "we must presume" that U.S. statutes are "primarily concerned with domestic conditions," not foreign conduct. *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010). The principle that Congress must clearly provide that a U.S. statute reaches a foreign transaction applies with full force in admiralty, for "[w]e cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws." *BREMEN*, 407 U.S. at 9. "[I]t has long been accepted in maritime jurisprudence that … if any construction otherwise be possible, an Act will not be construed as applying to foreigners in respect to acts done by them outside the dominions of the sovereign power enacting." *Lauritzen v. Larsen*, 345 U.S. 571, 578 (1953).

The Fourth, Fifth, and Ninth Circuits invert that presumption by applying the FMLA to wholly foreign transactions simply because the Act does not expressly limit its application to domestic entities. "The question is not whether [courts] think Congress would

have wanted a statute to apply to foreign conduct …, but whether Congress has affirmatively and unmistakably instructed that the statute will do so." *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2100 (2016) (internal quotation marks omitted). Nothing in the FMLA's text or its legislative history "rebut[s] the presumption against a congressional intent for a Unites States law to apply extraterritorially." *Trans-Tec*, 437 F. Supp. 2d at 1136. To the contrary, Congress intended to protect *American* suppliers. *Tramp Oil*, 805 F.2d at 46. The Fifth Circuit veered astray in departing from these precepts.[4]

III. This Case Presents An Ideal Vehicle For Resolving An Issue Of Exceptional Importance.

The divisions of authority described above reflect a 3-3 split among the most important federal admiralty jurisdictions—two of which have addressed these issues since this Court last considered a petition for certiorari—on the question whether a foreign supplier in a foreign transaction can claim an FMLA lien against a vessel by virtue of a contractual choice-of-law provision to which the vessel owner is not a party. WFS contends that the law is stable; that suppliers "know[] that their contractual arrangements will be

[4] While this Reply highlights the questions presenting the starkest circuit conflicts, the Petition also presents the question whether a reference to "General Maritime Law of the United States" incorporates the FMLA. Pet. ii, 21-27. WFS offers no response to this Court's opinion distinguishing "general maritime law"—judge-made law—from statutory law. *See* Pet. 22-23 (quoting *E. River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 864-65 (1986)).

recognized." Opp. 28-29. A foreign supplier like WFS, however, will be ill-advised to rely on a U.S. choice-of-law clause enforceable if the vessel docks in Baltimore or New Orleans, but not in New York or Savannah.

This uncertainty has enormous implications for a shipping industry that critically depends on uniformity. *See* Davis & Tan, *supra*, at 445-46. Any lienholder, including mortgagees, repairers, and suppliers, must price in the risk of losing priority to a subsequent preferred maritime lien. *See* Pet. 28; 46 U.S.C. § 31326(b)(1). These players require clear rules to make informed decisions. "[W]ithout strict circumscription of maritime liens, frequent arrests would impede the progress of individual vessels and deprive owners, charterers, and cargo interests of the certainty necessary for smooth operation of seabound trade." *ING Bank N.V. v. M/V TEMARA*, No. 16-cv-95 (KBF), 2016 WL 6156320, at *8 (S.D.N.Y. Oct. 21, 2016). No wonder, then, that "maritime practitioners eagerly … await" resolution of the questions presented by this case. Davis & Tan, *supra*, at 461.

These conflicts also threaten international comity. The majority rule, if accepted, would impose U.S. law abroad without weighing the interests of foreign nations that might have a stronger connection to the transaction. *See* Davis & Tan, *supra*, at 457-58; Amicus Br. 4-5. Permitting such suits additionally "clog[s] U.S. courts with collection actions for debts that have no meaningful connection to the United States," Amicus Br. 5, and leaves American transactions more vulnerable to the application of foreign law by foreign courts, *see Lauritzen*, 345 U.S. at 582.

This case presents the perfect occasion to resolve these conflicts. If this Court determines that the FMLA allows a foreign supplier to bind a vessel through a choice-of-law provision in a contract to which the vessel owner is not party, Petitioners lose. If it does not, Petitioners win. The Court should seize this opportunity to restore proper limits to the FMLA and bring uniformity to this critical area of the law.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

Peter B. Sloss
Robert H. Murphy
MURPHY, ROGERS, SLOSS, GAMBEL & TOMPKINS, APLC
701 Poydras Street
Suite 400
New Orleans, LA 70139

E. Joshua Rosenkranz
Counsel of Record
Thomas M. Bondy
Cynthia B. Stein
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019
(212) 506-5000
jrosenkranz@orrick.com

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